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February 14, 2017

VIA ELECTRONIC FILING
Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Perry Capital LLC v. Lew*, Nos. 14-5243 (L), 14-5254 (con.), 14-5263 (con)

Dear Mr. Langer:

We write pursuant to FRAP 28(j) to alert the Court to the U.S. Supreme Court's decision in *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (U.S. Jan. 18, 2017) (Exhibit A) and the Delaware Supreme Court's decision in *Dieckman v. Regency GP LP*, No. 208, 2016, 2017 WL 243361 (Del. Jan. 20, 2017) (Exhibit B).

In *Lightfoot*, the U.S. Supreme Court held that Fannie Mae's sue-and-be-sued clause does not grant federal courts jurisdiction over all cases involving Fannie Mae. *Lightfoot*, 137 S. Ct. at 554. In contrast, the Court explained that Freddie Mac's sue-and-be-sued clause and related jurisdictional provisions *do* provide original federal jurisdiction. *Id.* at 564. The Court noted the "clear textual" differences between the GSEs' respective charter provisions, and identified at least one "plausible reason" why Congress intended a different result for Freddie Mac than for Fannie Mae. *Id.* Hence, *Lightfoot* confirms that this Court should give effect to the plain meaning of 12 U.S.C. § 1452(f), which provides federal question jurisdiction over "all civil actions" in which Freddie Mac is a party. *Id.* That provides jurisdiction over all claims in this case, either directly or on a supplemental basis under 28 U.S.C. § 1367. *See* Class Plaintiffs' Supplemental Brief, at 2-3 (filed July 6, 2016). Further, the Class Action Fairness Act provides an additional, independent basis for subject matter jurisdiction over all Class Plaintiffs' claims. *Id.*

In *Dieckman*, the Delaware Supreme Court reiterated the proposition that the implied covenant of good faith and fair dealing, which is inherent in every contract, is breached "when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Dieckman*, 2017 WL 243361, at *6 (citations omitted). As set forth in our briefing, in enacting the Net Worth Sweep FHFA deprived Class Plaintiffs of any "fruits of their bargain"

and thereby breached the implied covenant. *See* Class Plaintiffs' Final Opening Brief, at 44-47 (filed Mar. 8, 2016); Class Plaintiffs' Final Reply Brief, at 16-17 (filed Mar. 8, 2016).

Respectfully Submitted,

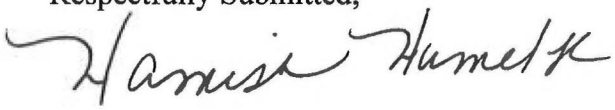

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Exhibit A

137 S.Ct. 553
Supreme Court of the United States

Crystal Monique LIGHTFOOT, et al., Petitioners
v.
CENDANT MORTGAGE CORPORATION, dba PHH Mortgage et al.

No. 14–1055.
|
Argued Nov. 8, 2016.
|
Decided Jan. 18, 2017.

Synopsis

Background: After dismissal of home mortgagor's prior federal action asserting state and federal claims against Federal National Mortgage Association (Fannie Mae), mortgagor and her daughter brought action against Fannie Mae in state court, relating to mortgage foreclosure. After removal based on sue-and-be-sued clause in Fannie Mae's federal corporate charter, the United States District Court for the Central District of California, Consuelo B. Marshall, Senior District Judge, denied plaintiffs' motion to remand and dismissed claims as barred by res judicata and collateral estoppel. Plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit, W. Fletcher, Circuit Judge, 769 F.3d 681, affirmed, determining that sue-and-be-sued clause conferred federal jurisdiction over claims brought by or against Fannie Mae. Certiorari was granted.

[Holding:] The Supreme Court, Justice Sotomayor, held that inclusion of phrase "any court of competent jurisdiction," in sue-and-be-sued clause of Fannie Mae's charter, merely permitted suit in any state or federal court already endowed with subject-matter jurisdiction over the suit, abrogating *Federal Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102, and *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust ex rel. Fed. Nat. Mortgage Assn. v. Raines*, 534 F.3d 779.

Reversed.

West Headnotes (6)

[1] **Courts**
Exclusive or Concurrent Jurisdiction
Federal Courts
Mortgages, liens, and security interests

"Court of competent jurisdiction," within meaning of provision of federal corporate charter for Federal National Mortgage Association (Fannie Mae), authorizing Fannie Mae to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, is a court with an existing source of subject-matter jurisdiction covering the case before it. Federal National Mortgage Association Charter Act, § 309(a), 12 U.S.C.A. § 1723a(a).

Cases that cite this headnote

[2] **Federal Courts**
Subject-matter jurisdiction in general

A court's subject-matter jurisdiction defines its power to hear cases.

Cases that cite this headnote

[3] **Courts**
Exclusive or Concurrent Jurisdiction
Federal Courts
Mortgages, liens, and security interests

Inclusion of phrase "any court of competent jurisdiction," in provision of federal corporate charter for Federal National Mortgage Association (Fannie Mae), authorizing Fannie Mae to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, did not grant federal courts subject-matter jurisdiction over all cases involving Fannie Mae, and instead permitted suit in any state or federal court already endowed with subject-matter jurisdiction over the suit; abrogating *Federal Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102, and *Pirelli Armstrong Tire Corp. Retiree Medical Benefits*

Trust ex rel. Fed. Nat. Mortgage Assn. v. Raines, 534 F.3d 779. Federal National Mortgage Association Charter Act, § 309(a), 12 U.S.C.A. § 1723a(a).

Cases that cite this headnote

[4] **Federal Courts**
Necessity of Objection;Power and Duty of Court

Federal Courts
Necessity

A federal court must have the power to decide the claim before it, i.e., subject-matter jurisdiction, and power over the parties before it, i.e., personal jurisdiction, before it can resolve a case.

Cases that cite this headnote

[5] **Statutes**
Legislative Construction

The "prior construction canon of statutory interpretation" teaches that if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning.

Cases that cite this headnote

[6] **Courts**
Exclusive or Concurrent Jurisdiction

The usual assumption is that state courts are up to the task of adjudicating their own laws.

Cases that cite this headnote

*554 *Syllabus* *

The Federal National Mortgage Association (Fannie Mae) is a federally chartered corporation that participates in the secondary mortgage market. By statute, Fannie Mae has the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). When petitioners Beverly Ann Hollis–Arrington and her daughter Crystal Lightfoot filed suit in state court alleging deficiencies in the refinancing, foreclosure, and sale of their home, Fannie Mae removed the case to federal court, relying on its sue-and-be-sued clause as the basis for jurisdiction. The District Court denied a motion to remand the case to state court and later entered judgment against petitioners. *555 The Ninth Circuit affirmed. In concluding that the District Court had jurisdiction under Fannie Mae's sue-and-be-sued clause, the court relied on *American Nat. Red Cross v. S. G.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201, which it read as establishing a rule that when a sue-and-be-sued clause in a federal charter expressly authorizes suit in federal court, it confers jurisdiction on the federal courts.

Held: Fannie Mae's sue-and-be-sued clause does not grant federal courts jurisdiction over all cases involving Fannie Mae. Pp. 558 – 565.

(a) This Court has addressed the jurisdictional reach of sue-and-be-sued clauses in five federal charters. Three clauses were held to grant jurisdiction—*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L.Ed. 204; *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956; *American Nat. Red Cross v. S. G.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201—while two were found wanting—*Bank of United States v. Deveaux*, 5 Cranch 61, 3 L.Ed. 38; *Bankers Trust Co. v. Texas & Pacific R. Co.*, 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010. Describing the earlier decisions as this Court's "best efforts at divining congressional intent retrospectively," 505 U.S., at 252, 112 S.Ct. 2465 the Court in *Red Cross* concluded that those decisions "support the rule that a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts," *id.*, at 255, 112 S.Ct. 2465.

In specifically mentioning the federal courts, Fannie Mae's sue-and-be-sued clause resembles the three clauses this Court has held confer jurisdiction. But unlike those clauses, Fannie Mae's clause adds the qualification "any court of competent jurisdiction," 12 U.S.C. § 1723a(a). Thus, the outcome here turns on the meaning of "court of competent jurisdiction."

A court of competent jurisdiction is a court with the power to adjudicate the case before it, Black's Law Dictionary 431, and a court's subject-matter jurisdiction defines its power to hear cases, see *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210. It follows that a court of competent jurisdiction is a court with a grant of subject-matter jurisdiction covering the case before it. This Court has understood that phrase as a reference to a court with an existing source of subject-matter jurisdiction. See, *e.g.*, *Ex parte Phenix Ins. Co.*, 118 U.S. 610, 7 S.Ct. 25, 30 L.Ed. 274. On this understanding, Fannie Mae's sue-and-be-sued clause is most naturally read not to grant federal courts subject-matter jurisdiction over all cases involving Fannie Mae but to permit suit in any state or federal court already endowed with subject-matter jurisdiction.

Red Cross does not require a different result. It did not set out a rule that an express reference to the federal courts suffices to make a sue-and-be-sued clause a grant of federal jurisdiction. Rather, it restated "the basic rule" of *Deveaux* and *Osborn* that a sue-and-be-sued clause conferring only a general right to sue does not grant jurisdiction to the federal courts. 505 U.S., at 253, 112 S.Ct. 2465. Pp. 558 – 562.

(b) Fannie Mae's arguments against reading its sue-and-be-sued clause as merely capacity conferring are unpersuasive. Its alternative readings of "court of competent jurisdiction" are premised on the already rejected reading of *Red Cross*. The prior construction canon of statutory interpretation does not apply because none of the cases on which Fannie Mae relies suggest that Congress in 1954 would have surveyed the jurisprudential landscape and ***556** necessarily concluded that the courts had already settled the question whether a sue-and-be-sued clause containing the phrase "court of competent jurisdiction" confers jurisdiction on the federal courts. Finally, Fannie Mae's appeals to congressional purpose do not call into question the plain text reading of its sue-and-be-sued clause. Pp. 561 – 565.

769 F.3d 681, reversed.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

The corporate charter of the Federal National Mortgage Association, known as Fannie Mae, authorizes Fannie Mae "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). This case presents the question whether this sue-and-be-sued clause grants federal district courts jurisdiction over cases involving Fannie Mae. We hold that it does not.

I

A

During the Great Depression, the Federal Government worked to stabilize and strengthen the residential mortgage market. Among other things, it took steps to increase liquidity (reasonably available funding) in the mortgage market. These efforts included the creation of the Federal Home Loan Banks, which provide credit to member institutions to finance affordable housing and economic development projects, and the Federal Housing Administration (FHA), which insures residential mortgages. See Dept. of Housing and Urban

Development, Background and History of the Federal National Mortgage Association 1–7, A4 (1966).

Also as part of these efforts, Title III of the National Housing Act (1934 Act) authorized the Administrator of the newly created FHA to establish "national mortgage associations" that could "purchase and sell [certain] first mortgages and such other first liens" and "borrow money for such purposes." § 301(a), 48 Stat. 1252–1253. The associations were endowed with certain powers, including the power to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." § 301(c), *id.*, at 1253.

In 1938, the FHA Administrator exercised that authority and chartered the Federal National Mortgage Association. Avoiding a mouthful of an acronym (FNMA), it went by Fannie Mae. See, *e.g.*, ***557** Washington Post, July 14, 1940, p. P2 (" 'Fanny May' "); N.Y. Times, Mar. 23, 1950, p. 48 (" 'Fannie Mae' "). As originally chartered, Fannie Mae was wholly owned by the Federal Government and had three objectives: to "establish a market for [FHA-insured] first mortgages" covering new housing construction, to "facilitate the construction and financing of economically sound rental housing projects," and to "make [the bonds it issued] available to ... investors." Fed. Nat. Mortgage Assn. Information Regarding the Activities of the Assn. 1 (Circular No. 1, 1938).

Fannie Mae was rechartered in 1954. Housing Act of 1954 (1954 Act), § 201, 68 Stat. 613. No longer wholly Government owned, Fannie Mae had mixed ownership: Private shareholders held its common stock and the Department of the Treasury held its preferred stock. The 1954 Act required the Secretary of the Treasury to allow Fannie Mae to repurchase that stock. See *id.*, at 613–615. It expected that Fannie Mae would repurchase all of its preferred stock and that legislation would then be enacted to turn Fannie Mae over to the private stockholders. From then on, Fannie Mae's duties would "be carried out by a privately owned and privately financed corporation." *Id.*, at 615. Along with these structural changes, the 1954 Act replaced Fannie Mae's initial set of powers with a more detailed list. In doing so, it revised the sue-and-be-sued clause to give Fannie Mae the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." *Id.*, at 620.

In 1968, Fannie Mae became fully privately owned and relinquished part of its portfolio to its new spinoff, the Government National Mortgage Association (known as Ginnie Mae). See Housing and Urban Development Act of 1968 (1968 Act), 82 Stat. 536. Fannie Mae "continue[d] to operate the secondary market operations" but became "a Government-sponsored private corporation." 12 U.S.C. § 1716b. Ginnie Mae "remain[ed] in the Government" and took over "the special assistance functions and management and liquidating functions." *Ibid.* Ginnie Mae received the same set of powers as Fannie Mae. See § 1723(a); see also 1968 Act, § 802(z), 82 Stat. 540 (minor revisions to § 1723a(a)).

This general structure remains in place. Fannie Mae continues to participate in the secondary mortgage market. It purchases mortgages that meet its eligibility criteria, packages them into mortgage-backed securities, and sells those securities to investors, and it invests in mortgage-backed securities itself. One of those mortgage purchases led to Fannie Mae's entanglement in this case.

B

Beverly Ann Hollis–Arrington refinanced her mortgage with Cendant Mortgage Corporation (Cendant) in the summer of 1999. Fannie Mae then bought the mortgage, while Cendant continued to service it. Unable to make her payments, Hollis–Arrington pursued a forbearance arrangement with Cendant. No agreement materialized, and the home entered foreclosure. Around this time, Cendant repurchased the mortgage from Fannie Mae because it did not meet Fannie Mae's credit standards.

To stave off the foreclosure, Hollis–Arrington and her daughter, Crystal Lightfoot, pursued bankruptcy and transferred the property between themselves. These efforts failed, and the home was sold at a trustee's sale in 2001. The two then took to the courts to try to undo the foreclosure and sale.

***558** After two unsuccessful federal suits, the pair filed this suit in state court. They alleged that deficiencies in the refinancing, foreclosure, and sale of their home entitled them to relief against Fannie Mae. Their claims against other defendants are not relevant here.

Fannie Mae removed the case to federal court under 28 U.S.C. § 1441(a), which permits a defendant to remove from state to federal court "any civil action" over which the federal district courts "have original jurisdiction." It relied on its sue-and-be-sued clause as the basis for jurisdiction. The District Court denied a motion to remand the case to state court.

The District Court then dismissed the claims against Fannie Mae on claim preclusion grounds. After a series of motions, rulings, and appeals not related to the issue here, the District Court entered final judgment. Hollis–Arrington and Lightfoot immediately moved to set aside the judgment under Federal Rule of Civil Procedure 60(b), alleging "fraud upon the court." App. 95–110. The District Court denied the motion.

The Ninth Circuit affirmed the dismissal of the case and the denial of the Rule 60(b) motion. 465 Fed.Appx. 668 (2012). After Hollis–Arrington and Lightfoot sought rehearing, the Ninth Circuit withdrew its opinion and ordered briefing on the question whether the District Court had jurisdiction over the case under Fannie Mae's sue-and-be-sued clause. 769 F.3d 681, 682–683 (2014).

A divided panel affirmed the District Court's judgment. The majority relied on *American Nat. Red Cross v. S. G.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992). It read that decision to have established a "rule [that] resolves this case": When a sue-and-be-sued clause in a federal charter expressly authorizes suit in federal courts, it confers jurisdiction on the federal courts. 769 F.3d, at 684. The dissent instead read *Red Cross* as setting out only a " 'default rule' " that provides a "starting point for [the] analysis." 769 F.3d, at 692 (opinion of Stein, J.). It read "any court of competent jurisdiction" in Fannie Mae's sue-and-be-sued clause to overcome that default rule by requiring an independent source for jurisdiction in cases involving Fannie Mae. *Ibid.*

Two Circuits have likewise concluded that the language in Fannie Mae's sue-and-be-sued clause grants jurisdiction to federal courts. See *Federal Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102 (C.A.1 2016) (Federal Home Loan Bank of Boston's identical sue-and-be-sued clause); *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust ex rel. Fed. Nat. Mortgage Assn. v. Raines*, 534 F.3d 779 (C.A.D.C.2008) (Fannie Mae's sue-and-be-sued clause). Four Circuits have disagreed, finding that similar language did not grant jurisdiction. See *Western Securities Co. v. Derwinski*, 937 F.2d 1276 (C.A.7 1991) (Under 38 U.S.C. § 1820(a)(1) (1988 ed.), Secretary of Veterans Affairs' authority to "sue and be sued ... in any court of competent jurisdiction, State or Federal"); *C.H. Sanders Co. v. BHAP Housing Development Fund Co.*, 903 F.2d 114 (C.A.2 1990) (Under 12 U.S.C. § 1702 (1988 ed.), Secretary of Housing and Urban Development's authority "in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal"); *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (C.A.5 1980) (*per curiam*) (similar); *Lindy v. Lynn*, 501 F.2d 1367 (C.A.3 1974) (similar).

We granted certiorari, 579 U.S. ——, 136 S.Ct. 2536, 195 L.Ed.2d 866 (2016), and now reverse.

II

Fannie Mae's sue-and-be-sued clause authorizes it "to sue and to be sued, and to ***559** complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). As in other federal corporate charters, this language serves the uncontroversial function of clarifying Fannie Mae's capacity to bring suit and to be sued. See *Bank of United States v. Deveaux*, 5 Cranch 61, 85–86, 3 L.Ed. 38 (1809). The question here is whether Fannie Mae's sue-and-be-sued clause goes further and grants federal courts jurisdiction over all cases involving Fannie Mae.

A

In answering this question, "we do not face a clean slate." *Red Cross*, 505 U.S., at 252, 112 S.Ct. 2465. This Court has addressed the jurisdictional reach of sue-and-be-sued clauses in five federal charters. Three clauses were held to grant jurisdiction, while two were found wanting.

The first discussion of sue-and-be-sued clauses came in a pair of opinions by Chief Justice Marshall. The charter of the first Bank of the United States allowed it " 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever.' " *Deveaux*, 5 Cranch, at 85. Another provision allowed suits in federal court against certain bank officials, suggesting "the right to

sue does not imply a right to sue in the courts of the union, unless it be expressed." *Id.*, at 86. In light of this language, the Court held that the first Bank of the United States had "no right ... to sue in the federal courts." *Ibid.* The Court concluded that the second Bank of the United States was not similarly disabled. Its charter allowed it " 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' " *Osborn v. Bank of United States*, 9 Wheat. 738, 817, 6 L.Ed. 204 (1824). The Court took from *Deveaux* "that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts." 9 Wheat., at 818. By contrast, the second Bank's charter did grant jurisdiction to the federal circuit courts because it used "words expressly conferring a right to sue in those Courts." *Ibid.*

A mortgage dispute between a railroad and its creditor led to the next consideration of this issue. The Texas and Pacific Railway Company's federal charter authorized it " 'to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States.' " *Bankers Trust Co. v. Texas & Pacific R. Co.*, 241 U.S. 295, 302, 36 S.Ct. 569, 60 L.Ed. 1010 (1916). This Court held that the clause had "the same generality and natural import as" the clause in *Deveaux*. 241 U.S., at 304, 36 S.Ct. 569. Thus, "all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court ... whose jurisdiction as otherwise competently defined was adequate to the occasion." *Id.*, at 303, 36 S.Ct. 569.

Another lending dispute, involving defaulted bonds, led to the next statement on this issue. The Federal Deposit Insurance Corporation's (FDIC) sue-and-be-sued clause authorized it "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." 12 U.S.C. § 264(j) (1940 ed.). In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455, 62 S.Ct. 676, 86 L.Ed. 956 (1942), this Court held that federal jurisdiction over the case was based on the FDIC's sue-and-be-sued clause. See *Red Cross*, 505 U.S., at 254, 112 S.Ct. 2465 (expressing no "doubt that the Court held federal jurisdiction to rest on the" sue-and-be-sued clause).

***560** This Court's most recent discussion of a sue-and-be-sued clause came in *Red Cross*, which involved a state-law tort suit related to a contaminated blood transfusion. It described the previous quartet of decisions as reflecting this Court's "best efforts at divining congressional intent retrospectively," efforts that had put "Congress on prospective notice of the language necessary and sufficient to confer jurisdiction." *Id.*, at 252, 112 S.Ct. 2465. Those decisions "support the rule that a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.*, at 255, 112 S.Ct. 2465. Under that rule, the Court explained, the result was "clear." *Id.*, at 257, 112 S.Ct. 2465. The Red Cross' sue-and-be-sued clause, which permits it to "sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States," 36 U.S.C. § 300105(a)(5), confers jurisdiction. *Red Cross*, 505 U.S., at 257, 112 S.Ct. 2465. "In expressly authorizing [suits] in federal courts, using language ... in all relevant respects identical to [the clause in *D'Oench*] on which [the Court] based a holding of federal jurisdiction just five years before [its enactment], the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction." *Ibid.*

Armed with these earlier cases, as synthesized by *Red Cross*, we turn to the sue-and-be-sued clause at issue here.

B

Fannie Mae's sue-and-be-sued clause resembles the clauses this Court has held confer jurisdiction in one important respect. In authorizing Fannie Mae "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal," 12 U.S.C. § 1723a(a), it "specifically mentions the federal courts." *Red Cross*, 505 U.S., at 255, 112 S.Ct. 2465. This mention of the federal courts means that Fannie Mae's charter clears a hurdle that the clauses in *Deveaux* and *Bankers Trust* did not.

But Fannie Mae's clause differs in a material respect from the three clauses the Court has held sufficient to grant federal jurisdiction. Those clauses referred to suits in the federal courts without qualification. In contrast, Fannie Mae's sue-and-be-sued clause refers to "any *court of competent jurisdiction*, State or Federal." § 1723a(a) (emphasis added). Because this sue-and-be-sued clause is not "in all relevant respects identical" to a clause already

held to grant federal jurisdiction, *Red Cross,* 505 U.S., at 257, 112 S.Ct. 2465 this case cannot be resolved by a simple comparison. The outcome instead turns on the meaning of "court of competent jurisdiction" in Fannie Mae's sue-and-be-sued clause.

[1] **[2]** A court of competent jurisdiction is a court with the power to adjudicate the case before it. See Black's Law Dictionary 431 (10th ed. 2014) ("[a] court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy"). And a court's subject-matter jurisdiction defines its power to hear cases. See *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (Subject-matter jurisdiction is "the courts' statutory or constitutional power to adjudicate the case" (emphasis deleted)); *Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303, 316, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006) ("Subject-matter jurisdiction ... concerns a court's competence to adjudicate a particular category of cases"). It follows that a court of competent jurisdiction is a court with a grant of subject-matter jurisdiction ***561** covering the case before it. Cf. *Pennoyer v. Neff,* 95 U.S. 714, 733, 24 L.Ed. 565 (1878) ("[T]here must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit").

As a result, this Court has understood the phrase "court of competent jurisdiction" as a reference to a court with an existing source of subject-matter jurisdiction. *Ex parte Phenix Ins. Co.,* 118 U.S. 610, 7 S.Ct. 25, 30 L.Ed. 274 (1886), provides an example. There, the Court explained that a statute "providing for the transfer to a trustee of the interest of the owner in the vessel and freight, provides only that the trustee may 'be appointed by any court of competent jurisdiction,' leaving the question of such competency to depend on other provisions of law." *Id.,* at 617, 7 S.Ct. 25. See also *Shoshone Mining Co. v. Rutter,* 177 U.S. 505, 506–507, 20 S.Ct. 726, 44 L.Ed. 864 (1900) (statute authorizing suit " 'in a court of competent jurisdiction' ... unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts"). *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), provides another. It held that § 10 of the Administrative Procedure Act, codified in 5 U.S.C. §§ 701–704, did not contain "an implied grant of subject-matter jurisdiction to review agency actions." 430 U.S., at 105, 97 S.Ct. 980. In noting that "the actual text ... nowhere contains an explicit grant of jurisdiction," the Court pointed to two clauses requiring "judicial review ... to proceed 'in a court specified by statute' or 'in a court of competent jurisdiction' " and stated that both "seem to look to outside sources of jurisdictional authority." *Id.,* at 105–106, and n. 6, 97 S.Ct. 980.

[3] On this understanding, Fannie Mae's sue-and-be-sued clause is most naturally read not to grant federal courts subject-matter jurisdiction over all cases involving Fannie Mae. In authorizing Fannie Mae to sue and be sued "in any court of competent jurisdiction, State or Federal," it permits suit in any state or federal court already endowed with subject-matter jurisdiction over the suit.

C

Red Cross does not require a different result. Some, including the lower courts here, have understood it to set out a rule that an express reference to the federal courts suffices to make a sue-and-be-sued clause a grant of federal jurisdiction. *Red Cross* contains no such rule.

By its own terms, the rule *Red Cross* restates is "the basic rule" drawn in *Deveaux* and *Osborn* that a sue-and-be-sued clause conferring only a general right to sue does not grant jurisdiction to the federal courts. *Red Cross,* 505 U.S., at 253, 112 S.Ct. 2465. Each mention of a "rule" refers back to this principle. See *id.,* at 255, 112 S.Ct. 2465 (reading this Court's sue-and-be-sued clause cases to "support the rule that a ... 'sue and be sued' provision *may* be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts" (emphasis added)); *id.,* at 256, 112 S.Ct. 2465 (*Bankers Trust* applied "the rule thus established" to hold that the railroad's sue-and-be-sued clause did not confer jurisdiction); 505 U.S., at 257, 112 S.Ct. 2465 (finding the result "clear" under the "rule established in these cases" because the charter "expressly authoriz[es]" suits in federal courts in a clause "in all relevant respects identical" to one already found to confer jurisdiction).

True enough, the dissent thought ***562** *Red Cross* established a broad rule. See 505 U.S., at 271–272, 112 S.Ct. 2465 (opinion of Scalia, J.) (describing *Red Cross* as announcing a "rule ... that any grant of a general capacity to sue with mention of federal courts will suffice to confer jurisdiction" (emphasis deleted)). The certainty of the

dissent may explain the lower court decisions adopting a broader reading of *Red Cross*. But *Red Cross* itself establishes no such rule. And such a rule is hard to square with the opinion's thorough consideration of the contrary arguments based in text, purpose, and legislative history. See *id.*, at 258–263, 112 S.Ct. 2465.

Nothing in *Red Cross* suggests that courts should ignore "the ordinary sense of the language used," *id.*, at 263, 112 S.Ct. 2465 when confronted with a federal charter's sue-and-be-sued clause that expressly references the federal courts, but only those that are courts "of competent jurisdiction."

III

Fannie Mae, preferring to be in federal court, raises several arguments against reading its sue-and-be-sued clause as merely capacity conferring. None are persuasive.

A

Fannie Mae first offers several alternative readings of "court of competent jurisdiction." It suggests that the phrase might refer to a court with personal jurisdiction over the parties before it, a court of proper venue, or a court of general, rather than specialized, jurisdiction. Brief for Respondents 41–45.

At bottom, Fannie Mae's efforts on this front are premised on the reading of *Red Cross* rejected above. In its view, an express reference to the federal courts suffices to confer subject-matter jurisdiction on federal courts. It sees its only remaining task as explaining why that would not render "court of competent jurisdiction" superfluous. See Tr. of Oral Arg. 29–30. But the fact that a sue-and-be-sued clause references the federal courts does not resolve the jurisdictional question. Thus, arguments as to why the phrase "court of competent jurisdiction" could still have meaning if it does not carry its ordinary meaning are beside the point.

[4] Moreover, even if the phrase carries additional meaning, that would not further Fannie Mae's argument. Take its suggestion that a "court of competent jurisdiction" is a court with personal jurisdiction. A court must have the power to decide the claim before it (subject-matter jurisdiction) and power over the parties before it (personal jurisdiction) before it can resolve a case. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–585, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). Recognizing as much, this Court has stated that the phrase "court of competent jurisdiction," while "usually used to refer to subject-matter jurisdiction, has also been used on occasion to refer to a court's jurisdiction over the defendant's person." *United States v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984) (footnote omitted). See also *Blackmar v. Guerre*, 342 U.S. 512, 516, 72 S.Ct. 410, 96 L.Ed. 534 (1952). But nothing in Fannie Mae's sue-and-be-sued clause suggests that the reference to "court of competent jurisdiction" refers only to a court with personal jurisdiction over the parties before it. At most then, this point might support reading the phrase to refer to both subject-matter and personal jurisdiction. That does not help Fannie Mae. So long as the sue-and-be-sued clause refers to an outside source of subject-matter jurisdiction, it does not confer subject-matter jurisdiction.

*563 B

[5] Fannie Mae next claims that, by the time its sue-and-be-sued clause was enacted in 1954, courts had interpreted provisions containing the phrase "court of competent jurisdiction" to grant jurisdiction and that Congress was entitled to rely on those interpretations. This argument invokes the prior construction canon of statutory interpretation. The canon teaches that if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).

Fannie Mae points to cases discussing three types of statutory provisions that, in its view, show that the phrase "court of competent jurisdiction" had acquired a settled meaning by 1954.

The first pair addresses the FHA's sue-and-be-sued clause. See 12 U.S.C. § 1702 ("sue and be sued in any court of competent jurisdiction, State or Federal"). Two Court of Appeals decisions in the 1940's concluded that the FHA sue-and-be-sued clause overrode the general rule, today found in 28 U.S.C. §§ 1346(a)(2), 1491, that monetary claims against the United States exceeding $10,000 must

be brought in the Court of Federal Claims, rather than the federal district courts. See *Ferguson v. Union Nat. Bank of Clarksburg*, 126 F.2d 753, 755–757 (C.A.4 1942); *George H. Evans & Co. v. United States*, 169 F.2d 500, 502 (C.A.3 1948). These courts did not state that their jurisdiction was founded on the sue-and-be-sued clause, as opposed to statutes governing the original jurisdiction of the federal district courts. See, *e.g.*, 28 U.S.C. § 41(a) (1946 ed.). Thus, even assuming that two appellate court cases can " 'settle' " an issue, A. Scalia & B. Garner, Reading Law 325 (2012), these two cases did not because they did not speak to the question here.

The second set of cases addresses provisions authorizing suit for a violation of a statute. One arose under the Fair Labor Standards Act of 1938, which authorizes employees to sue for violations of the Act in "any ... court of competent jurisdiction." § 6(d)(1), 88 Stat. 61, 29 U.S.C. § 216(b). This Court, in its description of the facts, stated that "[j]urisdiction of the action was conferred by ... 28 U.S.C. § 41(8), and ... 29 U.S.C. § 216(b)." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390, 62 S.Ct. 659, 86 L.Ed. 914 (1942). This brief, ambiguous statement did not settle the meaning of § 216(b), and thus did not settle the meaning of the phrase "court of competent jurisdiction." The other cases in this set dealt with the Housing and Rent Act of 1947. As enacted, the statute permitted suit in "any Federal, State, or Territorial court of competent jurisdiction." § 206(b), 61 Stat. 199. Some courts read § 206 not to confer jurisdiction and instead assessed their jurisdiction under the federal-question jurisdiction statute. See, *e.g.*, *Schuman v. Greenberg*, 100 F.Supp. 187, 189 (D.N.J.1951) (collecting cases). At the time, that statute carried an amount-in-controversy requirement, 28 U.S.C. § 41(1) (1946 ed.), and so some cases were dismissed or remanded to state court for lack of federal jurisdiction. Congress later amended § 206 to permit suit "in any Federal court of competent jurisdiction regardless of the amount involved." Defense Production Act Amendments of 1951, § 204, 65 Stat. 147. Congress' elimination of the amount-in-controversy requirement suggests, if anything, it understood that ***564** "court of competent jurisdiction" could be read to require an outside source of jurisdiction.

The third set of cases interpreted provisions making federal jurisdiction over certain causes of action exclusive. Brief for Respondents 36–37. Those cases confirm that the provisions require suit to be brought in federal courts but do not discuss the basis for federal jurisdiction.

In sum, none of the cases on which Fannie Mae relies suggest that Congress in 1954 would have surveyed the jurisprudential landscape and necessarily concluded that the courts had already settled the question whether a sue-and-be-sued clause containing the phrase "court of competent jurisdiction" confers jurisdiction on the federal courts.

C

Fannie Mae ends with an appeal to congressional purpose, or, more accurately, a lack of congressional purpose.

It argues that its original sue-and-be-sued clause, enacted in 1934, granted jurisdiction to federal courts and that there is no indication that Congress wanted to change the status quo in 1954. The addition in 1954 of "court of competent jurisdiction," a phrase that, as discussed, carries a clear meaning, means that the current sue-and-be-sued clause does not confer jurisdiction. An indication whether that meaning was understood as a change from the 1934 Act is not required. *

Fannie Mae next points to its sibling rival, the Federal Home Loan Mortgage Corporation, known as Freddie Mac. The two share parallel authority to compete in the secondary mortgage market. Compare 12 U.S.C. §§ 1717(b)(2)–(6) (Fannie Mae) with § 1454(a) (Freddie Mac). Suits involving Freddie Mac may be brought in federal court. See § 1452(c) ("to sue and be sued, complain and defend, in any State, Federal, or other court"); § 1452(f) (providing that Freddie Mac is a federal agency under 28 U.S.C. §§ 1345, 1442, that civil actions to which Freddie Mac is a party arise under federal law, and that Freddie Mac may remove cases to federal district court before trial).

[6] Fannie Mae argues there is no good reason to think that Congress gave Freddie Mac fuller access to the federal courts than it has. Leaving aside the clear textual indications suggesting Congress did just that, a plausible reason does exist. In 1970, when Freddie Mac's sue-and-be-sued clause and related jurisdictional provisions were enacted, Freddie Mac was a Government-owned corporation. See Emergency Home Finance Act of 1970,

§ 304(a), 84 Stat. 454. Fannie Mae, on the other hand, had already transitioned into a privately owned corporation. Fannie Mae's argument on this front, moreover, contains a deeper flaw. The doors to federal court remain open to Fannie Mae through diversity and federal-question jurisdiction. Fannie Mae provides no reason to think that in other cases, involving only state-law claims, access to the federal courts gives Freddie Mac an unintended ***565** competitive advantage over Fannie Mae that Congress would have wanted to avoid. Indeed, the usual assumption is that state courts are up to the task of adjudicating their own laws. Cf. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483–484, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981).

IV

The judgment of the Ninth Circuit is reversed.

It is so ordered.

All Citations

137 S.Ct. 553, 17 Cal. Daily Op. Serv. 412

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* The legislative history of the 1934 Act provides some reason to question Fannie Mae's premise about Congress' view of the status quo under the 1934 Act. During debate on this provision, Senator Logan asked Senator Bulkley, the chair of the subcommittee with authority over the bill, about the original sue-and-be-sued clause. Senator Bulkley explained that it merely conferred a capacity to sue and be sued "and [did] not confe[r] a right to go into a Federal court where it would not otherwise exist." 78 Cong. Rec. 12008 (1934).

Exhibit B

2017 WL 243361
Only the Westlaw citation is currently available.

Supreme Court of Delaware.

Adrian Dieckman, on behalf of himself and all others similarly situated, Plaintiff Below, Appellant,
v.
Regency GP LP, Regency GP LLC, Energy Transfer Equity, L.P., Energy Transfer Partners, L.P., Energy Transfer Partners,GP, L.P., Michael J. Bradley, James W. Bryant, Rodney L. Gray, John W. McReynolds, Matthew S. Ramsey and Richard Brannon, Defendants Below, Appellees.

No. 208, 2016
|
Submitted: November 16, 2016
|
Decided: January 20, 2017

Synopsis

Background: Limited partner of master limited partnership brought action against limited partnership, general partner, members of general partner's board of directors, and related entities, alleging breach of partnership agreement in connection with one of the entity's acquisition of partnership through merger. The Court of Chancery, Bouchard, Chancellor, 2016 WL 1223348, granted defendants' motion to dismiss. Limited partner appealed.

Holdings: The Supreme Court, Seitz, J., held that:

[1] obligations not to mislead unitholders and to appoint independent members to conflict committee were implied in partnership agreement, and

[2] limited partner's allegations were sufficient to challenge general partner's right to invoke safe harbor provisions for conflicted transactions.

Reversed.

West Headnotes (9)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo the trial court's decision granting a motion to dismiss.

Cases that cite this headnote

[2] **Corporations and Business Organizations**
Construction, operation, and effect

Partnership
Partnership agreement

In the case of an ambiguous partnership agreement of a publicly traded limited partnership, ambiguities are resolved as with publicly traded corporations, to give effect to the reading that best fulfills the reasonable expectations an investor would have had from the face of the agreement.

Cases that cite this headnote

[3] **Partnership**
Relation Among Partners

The Delaware Revised Uniform Limited Partnership Act provides for the implied covenant of good faith and fair dealing, which cannot be eliminated by contract. 6 Del. Code § 17-1101(d).

Cases that cite this headnote

[4] **Contracts**
Terms implied as part of contract

The implied covenant of good faith and fair dealing is inherent in all contracts and is used to infer contract terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated.

Cases that cite this headnote

[5] **Contracts**
Acts or Omissions Constituting Breach in General

Implied covenant of good faith and fair dealing applies when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.

Cases that cite this headnote

[6] **Contracts**
Terms implied as part of contract

The reasonable expectations of the contracting parties, for purposes of the implied covenant of good faith and fair dealing, are assessed at the time of contracting.

Cases that cite this headnote

[7] **Partnership**
Partnership agreement

In a situation involving a publicly traded master limited partnership and a claim of breach of partnership agreement, the pleading-stage inquiry focuses on whether, based on a reading of the terms of the partnership agreement and consideration of the relationship it creates between the partnership's investors and managers, the express terms of the agreement can be reasonably read to imply certain other conditions, or leave a gap, that would prescribe certain conduct, because it is necessary to vindicate the apparent intentions and reasonable expectations of the parties.

Cases that cite this headnote

[8] **Partnership**
Partnership agreement
Partnership
Conflict of interest and self-dealing

Obligations not to mislead unitholders of master limited partnership and to appoint qualified, unaffiliated members to conflict committee were implied in partnership agreement's conflict resolution safe harbor provisions for conflicted transactions, pursuant to which general partner could secure safe harbor by obtaining approval of unaffiliated unitholders or special approval of conflict committee comprised of members unaffiliated with general partner; such obligations were so obvious as not to require expression in the agreement. 6 Del. Code §§ 17-1101(c), 17-1101(d).

Cases that cite this headnote

[9] **Partnership**
Conflict of interest and self-dealing

Allegations that general partner of master limited partnership appointed to conflict committee members who were affiliated with general partner and that general partner materially misled partnership's unitholders regarding independence of committee members in proxy statement used to secure unitholders' approval of merger were sufficient to challenge general partner's ability to invoke partnership agreement's safe harbor provisions for conflicted transactions, pursuant to which general partner could secure safe harbor by obtaining approval of unaffiliated unitholders or special approval of conflict committee comprised of members unaffiliated with general partner.

Cases that cite this headnote

Court Below—Court of Chancery of the State of Delaware, C.A. No. 11130
Upon appeal from the Court of Chancery: **REVERSED**.

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Before STRINE, Chief Justice; HOLLAND, VALIHURA, VAUGHN, and SEITZ, Justices, constituting the Court en Banc.

Opinion

SEITZ, Justice:

*1 In this appeal, we again wade into the details of a master limited partnership agreement to decide whether the complaint's allegations can overcome the general partner's use of conflict resolution safe harbors to dismiss the case. The parties are identified by a host of confusing abbreviations, but the gist of the appeal is as follows.

The plaintiff is a limited partner/unitholder in the publicly-traded master limited partnership ("MLP"). The general partner proposed that the partnership be acquired through merger with another limited partnership in the MLP family. The seller and buyer were indirectly owned by the same entity, creating a conflict of interest. Because conflicts of interest often arise in MLP transactions, those who create and market MLPs have devised special ways to try to address them. The general partner in this case sought refuge in two of the safe harbor conflict resolution provisions of the partnership agreement—"Special Approval" of the transaction by an independent Conflicts Committee, and "Unaffiliated Unitholder Approval."

In the MLP context, Special Approval typically means that a Conflicts Committee composed of members independent of the sponsor and its affiliates reviewed the transaction and made a recommendation to the partnership board whether to approve the transaction. Unaffiliated Unitholder Approval is typically just that —a majority of unitholders unaffiliated with the general partner and its affiliates approve the transaction. Under the partnership agreement, if either safe harbor is satisfied, the transaction is deemed not to be a breach of the agreement.

The partnership agreement required that the Conflicts Committee be independent, meaning that its members could not be serving on affiliate boards and were independent under the audit committee independence rules of the New York Stock Exchange. The plaintiff alleged in the complaint that the general partner failed to satisfy the Special Approval safe harbor because the Conflicts Committee was itself conflicted. According to the plaintiff, one of the Committee's two members began evaluating the transaction while still a member of an affiliate's board, and then resigned from the affiliate's board four days after he began his review to then become a member of the Conflicts Committee. On the same day the transaction closed, the committee member was reappointed to the seat left vacant for him on the affiliate's board.

The plaintiff also alleged that the general partner failed to satisfy the Unaffiliated Unitholder Approval safe harbor because the general partner made false and misleading statements in the proxy statement to secure that approval. In the 165–page proxy statement sent to the unitholders, the general partner failed to disclose the conflicts within the Conflicts Committee. Instead, the proxy statement stated that Special Approval had been obtained by an independent Conflicts Committee.

The general partner moved to dismiss the complaint and claimed that, in the absence of express contractual obligations not to mislead investors or to unfairly manipulate the Conflicts Committee process, the general partner need only satisfy what the partnership agreement expressly required—to obtain the safe harbor approvals

and follow the minimal disclosure requirements. In other words, whatever the general partner said in the proxy statement, and whomever the general partner appointed to the Conflicts Committee, was irrelevant because only the express requirements of the partnership agreement controlled and displaced any implied obligations not to undermine the protections afforded unitholders by the safe harbors.

*2 The Court of Chancery side-stepped the Conflicts Committee safe harbor, but accepted the general partner's argument that the Unaffiliated Unitholder Approval safe harbor required dismissal of the case. The court held that, even though the proxy statement might have contained materially misleading disclosures, fiduciary duty principles could not be used to impose disclosure obligations on the general partner beyond those in the partnership agreement, because the partnership agreement disclaimed fiduciary duties. Further, the court agreed with the defendants that the only express disclosure requirement of the agreement in the event of a merger—that the general partner simply provide either a summary of, or a copy of, the merger agreement—displaced any implied contractual duty to disclose in the proxy statement material facts about the conflicts within the Conflicts Committee.

On appeal, the plaintiff concedes that if the general partner met the requirements of either safe harbor, his breach of contract claim would fail. The plaintiff also does not argue with the Court of Chancery's ruling that the partnership agreement's express disclosure requirements cannot be supplanted by implied or fiduciary-based disclosure obligations. Instead, he argues that the Court of Chancery erred when it concluded that the general partner satisfied the Unaffiliated Unitholder Approval safe harbor, because he alleged sufficient facts to show that the approval was obtained through false and misleading statements. The plaintiff also claims that, for pleading stage purposes, he has made a sufficient showing that the Special Approval safe harbor was not satisfied, because the Conflicts Committee was not independent.

We view the central issue in the dispute through a different lens than the Court of Chancery. The Court of Chancery was correct that the implied covenant of good faith and fair dealing cannot be used to supplant the express disclosure requirements of the partnership agreement. But the court focused too narrowly on the partnership agreement's disclosure requirements. Instead, the center of attention should have been on the conflict resolution provision of the partnership agreement.

The partnership agreement's conflict resolution provision is a powerful tool in the general partner's hands because it can be used to shield a conflicted transaction from judicial review. But the conflicts resolution provision also operates for the unitholders' benefit. It ensures that, before a safe harbor is reached by the general partner, unaffiliated unitholders have a vote, or the conflicted transaction is reviewed and recommended by an independent Conflicts Committee.

The partnership agreement does not address how the general partner must conduct itself when seeking the safe harbors. But where, as here, the express terms of the partnership agreement naturally imply certain corresponding conditions, unitholders are entitled to have those terms enforced according to the reasonable expectations of the parties to the agreement. The implied covenant is well-suited to imply contractual terms that are so obvious—like a requirement that the general partner not engage in misleading or deceptive conduct to obtain safe harbor approvals—that the drafter would not have needed to include the conditions as express terms in the agreement.

We find that the plaintiff has pled sufficient facts, which we must accept as true at this stage of the proceedings, that neither safe harbor was available to the general partner because it allegedly made false and misleading statements to secure Unaffiliated Unitholder Approval, and allegedly used a conflicted Conflicts Committee to obtain Special Approval. Thus, we reverse the Court of Chancery's order dismissing Counts I and II of the complaint.

I.

As alleged in the complaint, the plaintiff, Adrian Dieckman, is a unitholder of Regency. The business entity defendants, their relationships, and other abbreviations are as follows:

*3 Regency Energy Partners LP ("Regency")—a publicly-traded Delaware limited partnership engaged in the gathering and processing, contract compression, treating and transportation of natural gas and the

transportation, fractionation and storage of natural gas liquids.

Regency General Partner LP ("General Partner LP")—the general partner of Regency.

Regency General Partner LLC ("General Partner LLC")—a Delaware LLC and the general partner of General Partner LP. [1]

Energy Transfer Partners L.P. ("ETP")—the general partner of Sunoco LP; a 43% owner of limited partnership interests in Sunoco and a 100% owner of Sunoco's distribution rights.

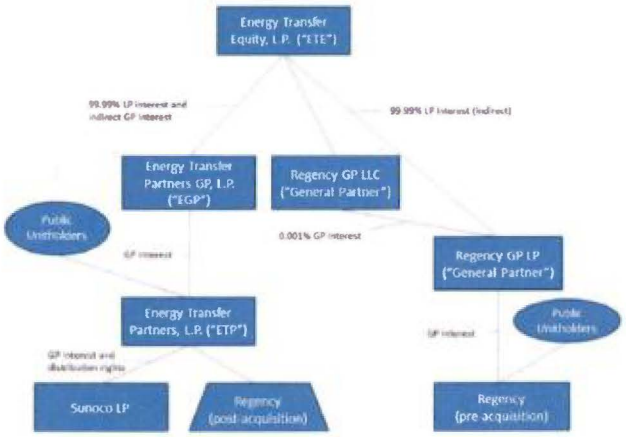
Energy Transfer Partners, GP, L.P. ("EGP")—the general partner of ETP.

Energy Transfer Equity, L.P. ("ETE")—indirectly owns Regency's general partner and ETP's general partner.

Conflicts Committee—the committee formed by the General Partner under § 7.9(a) of the LP Agreement.

LP Agreement—the Regency limited partnership agreement.

The following is a diagram from the Court of Chancery opinion showing the interconnected relationships among the entities before the merger, and Regency's status after the merger:



The remaining defendants are the six members of General Partner LP's board of directors—Michael J. Bradley (also CEO of the General Partner), James W. Bryant, Rodney L. Gray, John W. McReynolds (also CFO and president of ETE), Matthew S. Ramsay, and Richard Brannon. Bryant and Brannon served on the Conflicts Committee of the General Partner's board. Brannon was a Sunoco director until January 20, 2015, and was reappointed to the Sunoco board on May 5, 2015. Bryant was appointed to Sunoco's board on May 5, 2015.

A.

According to the complaint and the proxy statement distributed to unitholders, [2] the ETP and ETE boards met to discuss a merger between ETP and Regency. ETP eventually made a merger proposal to Regency, where Regency would be merged into ETP for a combination of cash and stock using an exchange ratio of 0.4044 ETP common units for one Regency common unit, and a $137 million cash payment. Because of the undisputed conflicts of interest in the proposed merger transaction, the General Partner looked to the conflict resolution provisions of the LP Agreement.

Under § 7.9(a) of the LP Agreement, entitled "Resolution of Conflicts of Interest; Standards of Conduct and Modification of Duties," unless otherwise provided in another agreement, the General Partner can resort to several safe harbors to immunize conflicted transactions from judicial review:

> [A]ny resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement ... or of any duty stated or implied by law or equity, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval, (ii) approved by the vote of a majority of the Common Units (excluding Common Units owned by the General Partner and its Affiliates), (iii) on terms no less favorable to the Partnership than those generally being provided to or available from unrelated third parties, or (iv) fair and reasonable to the Partnership, taking into account the totality of the relationships

> between the parties involved (including other transactions that may be particularly favorable or advantageous to the Partnership). [3]

*4 The General Partner sought the protections of the safe harbors by Special Approval under § 7.9(a)(i) and Unaffiliated Unitholder Vote under § 7.9(a)(ii). Special Approval is defined in the LPA as "approval by a majority of the members of the Conflicts Committee." [4] The Conflicts Committee must be:

> [A] committee of the Board of Directors of the general partner of the General Partner [5] composed entirely of two or more directors who are not (a) security holders, officers or employees of the General Partner, (b) officers, directors or employees of any Affiliate of the General Partner[,] or (c) holders of any ownership interest in the Partnership Group other than Common Units and who also meet the independence standards required of directors who serve on an audit committee of a board of directors established by the Securities Exchange Act of 1934, as amended, and the rules and regulations of the Commission thereunder and by the National Securities Exchange on which the Common Units are listed or admitted to trading. [6]

For purposes of subsection (b), "Affiliate" is defined as any person "that directly or indirectly through one or more intermediaries controls, is controlled by or is under control with, the Person in question." [7] Sunoco and the General Partner are both controlled by ETE, and are "Affiliates," under the LP Agreement. Thus, Sunoco board members were not eligible to serve as members of the General Partner's Conflicts Committee. Nor was it clear that they would meet the audit committee independence rules of the New York Stock Exchange.

B.

The General Partner appointed Brannon and Bryant to the Conflicts Committee. The complaint alleges that before the proposed transaction, Brannon was a Sunoco director. On January 16, 2015, ETE appointed Brannon to the General Partner's board, while still a director of Sunoco. The plaintiff claims that, from January 16–20, while a member of both boards, Brannon consulted informally on the proposed transaction. According to the complaint, Brannon then temporarily resigned from the Sunoco board on January 20, and on January 22, became an official member of the Conflicts Committee when formal resolutions were passed creating the Committee. Brannon and Bryant then negotiated on behalf of Regency with ETP and recommended the merger transaction to the General Partner. On April 30, 2015, the day that the merger closed, Brannon was reappointed to the Sunoco board, and Bryant was also appointed to Sunoco board.

The complaint also alleges that the Conflicts Committee retained a conflicted financial advisor, J.P. Morgan. J.P. Morgan was supposedly chosen by Regency's CFO, Long, and not by the Conflicts Committee. Because it was allegedly known that Long was expected to become the CFO of ETP GP LLC, the plaintiff claims that J.P. Morgan was beholden to Long and would favor its long-term relationship with the Energy Transfer entities.

The plaintiff claims that the negotiations between the Conflicts Committee and ETP were ceremonial and only lasted a few days. According to the complaint, between January 23 and January 25, the Conflicts Committee made a perfunctory and slightly increased counteroffer to ETP's offer, which would have achieved a 15% premium to the closing price of common units. ETP rejected the counteroffer, and the parties settled on ETP's opening bid of a 13.2% premium to the January 23 closing price. The Conflicts Committee recommended that the General Partner pursue the transaction on the original terms proposed by ETP, which the General Partner approved on January 25. The plaintiff alleges that the entire process from start to finish lasted nine days.

C.

*5 The LP Agreement only required minimal disclosure when a merger transaction was considered by the unitholders—a summary of, or a copy of, the merger agreement.[8] But the General Partner went beyond the minimal requirements in the LP Agreement. To gain Unaffiliated Unitholder Approval and the benefit of the safe harbor, the General Partner filed a 165–page proxy statement and disseminated it and a copy of the merger agreement to the unitholders.

The proxy statement stated that the "Conflicts Committee consists of two independent directors: Richard D. Brannon (Chairman) and James W. Bryant."[9] It also stated that the Conflicts Committee approved the transaction, and such approval "constituted 'Special Approval' as defined in the Regency partnership agreement."[10] The proxy statement did not inform unitholders about the circumstances of Bryant's alleged overlapping and shifting allegiances, including reviewing the proposed transaction while still a member of the Sunoco board, his nearly contemporaneous resignation from the Sunoco board and appointment to the General Partner's board and then the Conflicts Committee, or Brannon's appointment and Bryant's reappointment to the Sunoco board the day the transaction closed. At a special meeting of Regency's unitholders on April 28, 2015, a majority of Regency's unitholders, including a majority of its unaffiliated unitholders, approved the merger.

D.

After plaintiff filed his complaint challenging the fairness of the merger transaction, the defendants moved to dismiss under Court of Chancery Rule 12(b)(6), invoking the protections of Special Approval and Unaffiliated Unitholder Approval under the LP Agreement. The Chancellor reached only the Unaffiliated Unitholder Vote safe harbor. After finding that all fiduciary duties were displaced by contractual terms, the court noted that the LP Agreement contained "just a single disclosure requirement" and thus the LP Agreement terms "unambiguously extinguish the duty of disclosure and replace it with a single disclosure requirement."[11] According to the court, given the express disclosure obligation, the implied covenant of good faith and fair dealing "has no work to do" because "the express waiver of fiduciary duties and the clearly defined disclosure requirement ... prevent the implied covenant from adding any additional disclosure obligations to the agreement."[12] Once the Unaffiliated Unitholder Vote safe harbor applied, the court dismissed the case because "the Merger is deemed approved by all the limited partners, including plaintiff, and is immune to challenge for contractual breach."[13]

II.

[1] The appeal comes to us from the Court of Chancery's decision granting the defendants' motion to dismiss. Our review is de novo.[14]

A.

We start with the settled principles of law governing Delaware limited partnerships. The Delaware Revised Uniform Limited Partnership Act ("DRUPLA") gives "maximum effect to the principle of freedom of contract."[15] One freedom often exercised in the MLP context is eliminating any fiduciary duties a partner owes to others in the partnership structure.[16] The act allows drafters of Delaware limited partnerships to modify or eliminate fiduciary-based principles of governance, and displace them with contractual terms.

*6 With the contractual freedom accorded partnership agreement drafters, and the typical lack of competitive negotiations over agreement terms, come corresponding responsibilities on the part of investors to read carefully and understand their investment. Investors must appreciate that "with the benefits of investing in alternative entites often comes the limitation of looking to the contract as the exclusive source of protective rights."[17] In other words, investors can no longer hold the general partner to fiduciary standards of conduct, but instead must rely on the express language of the partnership agreement to sort out the rights and obligations among the general partner, the partnership, and the limited partner investors.

[2] [3] Even though the express terms of the agreement govern the relationship when fiduciary duties are waived,

investors are not without some protections. For instance, in the case of an ambiguous partnership agreement of a publicly traded limited partnership, ambiguities are resolved as with publicly traded corporations, to give effect to the reading that best fulfills the reasonable expectations an investor would have had from the face of the agreement. [18] The reason for this is simple. When investors buy equity in a public entity, they necessarily rely on the text of the public documents and public disclosures about that entity, and not on parol evidence. [19] And, of course, another protection exists. The DRUPLA provides for the implied covenant of good faith and fair dealing, which cannot be eliminated by contract. [20]

[4] [5] [6] [7] The implied covenant is inherent in all contracts and is used to infer contract terms "to handle developments or contractual gaps that the asserting party pleads neither party anticipated." [21] It applies "when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." [22] The reasonable expectations of the contracting parties are assessed at the time of contracting. [23] In a situation like this, involving a publicly traded MLP, the pleading-stage inquiry focuses on whether, based on a reading of the terms of the partnership agreement and consideration of the relationship it creates between the MLP's investors and managers, the express terms of the agreement can be reasonably read to imply certain other conditions, or leave a gap, that would prescribe certain conduct, because it is necessary to vindicate the apparent intentions and reasonable expectations of the parties.

B.

*7 The Court of Chancery decided that the implied covenant could not be used to remedy what the plaintiff alleged were faulty safe harbor approvals because the LP Agreement waived fiduciary-based standards of conduct and contained an express contractual term addressing what disclosures were required in merger transactions. According to the court, the implied covenant had "no work to do" because the express disclosure requirement displaced the implied covenant. [24]

[8] The Court of Chancery erred by focusing too narrowly on whether the express disclosure provision displaced the implied covenant. Instead, it should have focused on the language of the safe harbor approval process, and what its terms reasonably mean. Although the terms of the LP Agreement did not compel the General Partner to issue a proxy statement, it chose to undertake the transaction, which the LP Agreement drafters would have known required a pre-unitholder vote proxy statement. Thus, the General Partner voluntarily issued a proxy statement to induce unaffiliated unitholders to vote in favor of the merger transaction. The favorable vote led not only to approval of the transaction, but allowed the General Partner to claim the protections of the safe harbor and immunize the merger transaction from judicial review. Not surprisingly, the express terms of the LP Agreement did not address, one way or another, whether the General Partner could use false or misleading statements to enable it to reach the safe harbors.

We find that implied in the language of the LP Agreement's conflict resolution provision is a requirement that the General Partner not act to undermine the protections afforded unitholders in the safe harbor process. Partnership agreement drafters, whether drafting on their own, or sitting across the table in a competitive negotiation, do not include obvious and provocative conditions in an agreement like "the General Partner will not mislead unitholders when seeking Unaffiliated Unitholder Approval" or "the General Partner will not subvert the Special Approval process by appointing conflicted members to the Conflicts Committee." But the terms are easily implied because "the parties must have intended them and have only failed to express them because they are too obvious to need expression." [25] Stated another way, "some aspects of the deal are so obvious to the participants that they never think, or see no need, to address them." [26]

*8 Our use of the implied covenant is based on the words of the contract and not the disclaimed fiduciary duties. Under the LP Agreement, the General Partner did not have the full range of disclosure obligations that a corporate fiduciary would have had. Yet once it went beyond the minimal disclosure requirements of the LP Agreement, and issued a 165–page proxy statement to induce the unaffiliated unitholders not only to approve the merger transaction, but also to secure the Unaffiliated Unitholder Approval safe harbor, implied in the language

of the LP Agreement's conflict resolution provision was an obligation not to mislead unitholders.

Further, the General Partner was required to form a Conflicts Committee comprised of members who:

> [A]re not (a) security holders, officers or employees of the General Partner, (b) officers, directors or employees of any Affiliate of the General Partner or (c) holders of any ownership interest in the Partnership Group other than Common Units and who also meet the independence standards required of directors who serve on an audit committee of a board of directors established by the Securities Exchange Act of 1934, as amended, and the rules and regulations of the Commission thereunder and by the National Securities Exchange on which the Common units are listed or admitted to trading. [27]

As with the contract language regarding Unaffiliated Unitholder Approval, this language is reasonably read by unitholders to imply a condition that a Committee has been established whose members genuinely qualified as unaffiliated with the General Partner and independent at all relevant times. Implicit in the express terms is that the Special Committee membership be genuinely comprised of qualified members and that deceptive conduct not be used to create the false appearance of an unaffiliated, independent Special Committee.

C.

[9] The plaintiff has agreed that the LP Agreement's safe harbor provisions, if satisfied, would preclude judicial review of the transaction. But we find that the plaintiff has pled sufficient facts to support his claims that those safe harbors were unavailable to the General Partner. Instead of staffing the Conflicts Committee with independent members, the plaintiff alleges that the chair of the two-person Committee started reviewing the transaction while *still* a member of an Affiliate board. Just a few days before the General Partner created the Conflicts Committee, the same director resigned from the Affiliate board and became a member of the General Partner's board, and then a Conflicts Committee member.

Further, after conducting the negotiations with ETE over the merger terms and recommending the merger transaction to the General Partner, the two members of the Conflicts Committee joined an Affiliate's board the day the transaction closed. The plaintiff also alleges that the Conflicts Committee members failed to satisfy the audit committee independence rules of the New York Stock Exchange, as required by the LP Agreement. In the proxy statement used to solicit Unaffiliated Unitholder Approval of the merger transaction, the plaintiff alleges that the General Partner materially misled the unitholders about the independence of the Conflicts Committee members. In deciding to approve the merger, a reasonable unitholder would have assumed based on the disclosures that the transaction was negotiated and approved by a Conflicts Committee composed of persons who were not "affiliates" of the general partner and who had the independent status dictated by the LP Agreement. This assurance was one a reasonable investor may have considered a material fact weighing in favor of the transaction's fairness.

***9** The plaintiff has therefore pled facts raising sufficient doubt about the General Partner's ability to use the safe harbors to shield the merger transaction from judicial review. Thus, we reverse the judgment of the Court of Chancery dismissing Counts I and II of the complaint.

All Citations

--- A.3d ----, 2017 WL 243361

Footnotes

1 Like the Court of Chancery, for simplicity's sake we collapse General Partner LP and General Partner LLC into one as the "General Partner" of Regency, recognizing that there were two layers of general partners.

2 The proxy statement incorporated into the complaint and relied on by the parties is properly considered on a motion to dismiss. *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013).

3 App. to Opening Br. at 105 (LP Agreement § 7.9(a)).

4 *Id.* at 70 (LP Agreement § 1.1).

5 The general partner of the General Partner is Regency GP LLC. As noted before, for simplicity sake, "General Partner" in this decision includes both Regency GP LP and Regency GP LLC.

6 App. to Opening Br. at 62 (LP Agreement § 1.1).

7 *Id.* at 49 (LP Agreement § 1.1).

8 *Id.* at 124–35 (LP Agreement § 14.3(a)).

9 *Id.* at 215.

10 *Id.*

11 *Dieckman v. Regency GP LP*, 2016 WL 1223348, at *9 (Del. Ch. Mar. 29, 2016).

12 *Id.*

13 *Id.* at *10.

14 *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 (Del. 2013).

15 6 *Del. C.* § 17–1101(c).

16 6 *Del. C.* § 17–1101(d).

17 *The Haynes Family Trust v. Kinder Morgan G.P., Inc.*, 135 A.3d 76, 2016 WL 912184, at *2 (Del. Mar. 10, 2016).

18 *Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551–52 (Del. 2013) (construing an agreement against the drafter to give effect to the "investors' reasonable expectation" using a species of the *contra proferentem* doctrine); *see also Norton v. K–Sea Transp. Partners L.P.*, 67 A.3d 354, 365 n. 56 (Del. 2013); *SI Mgmt., L.P. v. Wininger*, 707 A.2d 37, 42–43 (Del. 1998).

19 *Stockman v. Heartland Industrial Partners, L.P.*, 2009 WL 2096213 at *5 (Del. Ch. July 14, 2009) (ambiguities are construed against drafter "to protect the reasonable expectations of people who join a partnership or other entity after it was formed and must rely on the face of the operating agreement to understand their rights and obligations when making the decision to join.").

20 *See* 6 *Del. C.* § 17–1101(d).

21 *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (internal citations omitted).

22 *Id.* at 1126 (citing *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)).

23 *Id.* (citing *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1234 (Del. Ch. 2000)).

24 *Dieckman*, 2016 WL 1223348, at *9.

25 *Danby v. Osteopathic Hospital Ass'n of Del.*, 101 A.2d 308, 313–14 (Del. Ch. 1953), *aff'd*, 104 A.2d 903 (Del. 1954).

26 *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782, at *16 (Del. Ch. June 12, 2014), *rev'd on other grounds sub nom. El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, —— A.3d ——, 2016 WL 7380418 (Del. Dec. 20, 2016) (citing *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986)); 508 A.2d at 880 ("[P]arties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations.") (quoting *Corbin on Contracts* (Kaufman Supp. 1984), § 570)); *see also Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873, at *5 (Del. Ch. Aug. 13, 1997), *aff'd*, 708 A.2d 989 (Del. 1998) ("Terms are to be implied in a contract not because they are reasonable but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because they are too obvious to need expression." (quoting *Danby*, 101 A.2d at 313–14)).

27 App. to Opening Br. at 62 (LP Agreement § 1.1).